2006 WL 6142739 (Miss.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Mississippi.
Lee County

Gloria ASHBY, by and through Her Brother and Next Friend,
Carl Felds As Conservator of the Estate of Gloria Ashby, Plaintiff,
v.
BEVERLY HEALTHCARE-EASON BLVD; Beverly Enterprises-Mississippi, Inc.; those operating subsidiaries and affiliated entities of Beverly Enterprises, Inc. and Beverly Enterprises-Mississippi, Inc. connected with the ownership or operation of Beverly Healthcare-Eason Blvd; Tupelo Nursing And Rehabilitation Center, LLC; Deborah H. Spence, Administrator; John Doe Additional Owners 1 through 10; John Doe Management Companies 11 through 20; John Doe Nursing Home Personnel Contractors 21-30; John Doe Consultants 31-40; John Doe Administrators 41 - 50; John Doe Directors of Nursing 51-60; John Doe Medical Directors 61-70; John Doe Assessment Nurses, 71 - 80; John Doe Nurses 81 - 100; John Doe Dieticians 101-120; John Doe Social Workers 121-140; John Doe Direct Care Workers 141-180; John Doe Licensees, Governing Board embers and Managers 181-200; Unspecified John Does 201-225, Defendants.

No. CV05-008(A)L.
March 22, 2006.

Plaintiff's Response Motion to Dismiss, or in the Alternative, for Summary Judgment of Defendant Deborah H. Spence

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COMES NOW the Plaintiff, Carl Fields (hereinafter “Plaintiff'), by and through the undersigned counsel of record, and files this Response to Deborah Spence's Motion to Dismiss, or in the Alternative, for Summary Judgment, and would show unto the Court as follows:

INTRODUCTION

Gloria Ashby was a resident of Beverly Healthcare Eason Blvd. During her residency, systemic failures in the operation, management and control of Beverly Healthcare Eason Blvd caused her to suffer a number of serious injuries. These problems were not the result of a single incident or merely the day to day care and treatment of Gloria Ashby. They were the result of a corporate culture of cutting resources and care at the expense of resident safety and health in order to increase the bottom line and to provide substantial benefits to key personnel throughout the Beverly organization. Plaintiff's injuries were the result of matters such as control of budgeting, resources, marketing, human resources management, training, staffing, creation and implementation of policies and procedures, federal and state Medicare and Medicaid reimbursement practices, quality care assessment and compliance issues, and **financial**, tax, accounting and fiscal policies. (See Complaint Generally)

What happened to Gloria Ashby didn't happen by happenstance. It wasn't the result of a single person's isolated carelessness or negligence on a specific occasion. It was the product of actions and omissions by several people, including Deborah Spence, and of patterns of operation of the facility and care for residents, including failures of supervision of direct care workers and

nursing staff, that systematically resulted in substandard care with full knowledge of the administrator and other managers that the environment thus created endangered residents, had led to serious illness and injury in the past and would repeatedly continue to do so if not properly addressed and corrected. The pattern of operation and care was the result of a culture which knowingly cut resources, such as but not limited to nursing staff and medical procedures, to the bone to enhance profits as well as compensation and benefits to key officers and employees. In short, this culture was the cause of the substandard care received by many residents, including Gloria Ashby, and that substandard care caused by the culture is what led to a loss of dignity, abuse and various injuries to Gloria Ashby. Deborah Spence, as Administrator, was a key actor in that culture and pattern of operation and pattern of substandard care to all residents including Gloria Ashby, particularly in regard to what resources were available to provide for her care, assuring that appropriate policies and procedures were adopted and implemented and consistently followed, monitoring staff performance and monitoring and assuring compliance with minimum standards of care.

Gloria Ashby had lost the ability to care for her very basic needs. She was essentially helpless. She depended on Deborah Spence and the staff she supervised for adequate food, water, supervision, assistance with his most basic activities of daily living, basic care, monitoring and assessment of changes in his condition, and appropriate nursing care once a problem occurred. Suffice it to say that this situation involved day-to-day even hour-by-hour fundamental care. Gloria Ashby was in the custody of and completely at the mercy of the nursing home and its staff, including Deborah Spence, for her very existence. Thus, this action may be more accurately likened to child neglect/abuse case than a basic negligence or malpractice case involving an independent adult injured in a single incident or two by a particular health care worker.

This case is about a pattern of neglect so pervasive that Gloria Ashby suffered day in and day out with no reprieve. What the evidence will show is not simply that these things happened and injured Gloria Ashby but why and how they happened. The why and how these things happened demonstrates that what happened to Gloria Ashby was not an unfortunate chance consequence that occurred despite the exercise of reasonable care by Deborah Spence and the other defendants, but rather was proximately caused by a failure to exercise reasonable care throughout the entire running of the facility, including the administrative aspects for which Deborah Spence was responsible. It wasn't the result of unintentional innocent mistakes or isolated actions. It was the result of administration, supervision and a corporate environment that put money, cost cutting, profit and benefits to the owners and operators of Beverly Healthcare and their key employees ahead of the needs of residents, despite having knowledge that cutting resources too thin endangered residents. It is that motive and knowledge, and failure to take action to correct the situation despite that knowledge, that makes what happened to Gloria Ashby wilful, wanton and grossly negligent conduct as opposed to merely negligent conduct.

In her motion, Deborah Spence admits that she was the Administrator at Beverly Healthcare during the times relevant to this case. A key player in terms of assuring in this corporate culture that sufficient properly trained staff were available and were following appropriate procedures in providing care to Gloria Ashby and other residents was the Administrator. The Administrator's duties included providing and insuring sufficient staffing levels to provide adequate care, adequate training of staff to provide appropriate care, adequate supervision of the line staff rendering daily care, proper review and evaluation of staff performance, creating and enforcing policies for screening and hiring of staff, creation and enforcing policies to assure adequate care and treatment of patients meeting their medical, nursing and social needs, assuring that a proper treatment care plan is developed and consistently implemented for each resident, and implementing corrective measures to cure any problems in these areas.

Deborah Spence's Motion to Dismiss (or in the alternative for Summary Judgment) is based on a failure to state a claim theory. She claims that she did not directly participate in the care and treatment of Gloria Ashby and that Plaintiff has failed to allege any basis for personal liability against Spence because she was merely an employee of Beverly, i.e., the agent of a disclosed principal. But the Administrator's duties as set out in the Minimum Standards for Nursing Homes demonstrate that the Administrator's duties have a direct effect on the provision of care to Gloria Ashby. In negligently performing these duties and/or failing to perform these duties, the Administrator's negligence directly contributed to Gloria Ashby's care and directly contributed to the cause of Gloria Ashby's injuries.

The Complaint in this case specifically sets forth these duties, their breach, and how Deborah Spence directly participated in this negligence in the Administrator Conduct Count. Paragraphs in this count specify how Deborah Spence was or should have been directly involved in the care Gloria Ashby received. This Count ties Deborah Spence's negligence directly into the causation of the injuries suffered by Gloria Ashby.

ARGUMENT

Applicable Standard

"When considering a motion to dismiss, the allegations in the Complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt the plaintiff will not be able to prove any set of facts in support of his claim." *Poindexter v. Southern United Fire Ins.* Co., 838 So. 2d 964, 966 (Miss. 2003). Even if the initial complaint fails to state a claim, the plaintiff must be given leave to amend the complaint to cure the defect. *Id* at 970-971

As movant for summary judgment, Spence has the burden of proving to a certainty that Carl Fields is entitled to no relief under any set of facts that could be proved in support of his claims. *Butler v. Bd. Of Supervisors for Hinds County,* 659 So. 2d 578, 581 (Miss. 1995)." The burden is on the moving party to establish all of the requisites of his demand for summary judgment. On each element of his claim or defense, he must show, first, that there is no genuine issue of material fact and, second, that he is entitled to judgment as a matter of law." *American Legion Ladnier Post Number 42, Inc. v. Ocean Springs,* 562 So. 2d 103, 106 (Miss. 1990) All doubts must be resolved in favor of Carl Fields as the nonmoving party. *Moore v. Memorial Hospital of Gulfport,* 825 So. 2d 658, ¶15 (Miss. 2002); *McCullough v. Cook,* 679 So. 2d 627,630 (Miss. 1996). A "motion for summary judgment should be denied unless the trial court finds beyond any reasonable doubt that the plaintiff would be unable to prove any facts to support his/her claim." *Lumberman's Underwriting Alliance v. City of Rosedale,* 727 So.2d 710, ¶12 (Miss. 1998) citing *Yowell v. James Harkins Builder, Inc.,* 645 So.2d 1340,1343 (Miss. 1994); *Fadden v. State,* 580 So.2d 1210 (Miss. 1991).

The Court must carefully review all evidentiary matters before it, including admissions in pleadings, answers to interrogatories, and depositions, in the light most favorable to the nonmoving party. *Miller v. Meeks,* 762 So.2d 302, ¶ 3 (Miss. 2000). The nonmoving party must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Dailey v. Methodist Medical Center,* 790 So.2d 903, ¶15 (Miss. App. 2001). Thus, the facts and evidence must be considered in the light most favorable to Carl Fields. If there is any doubt, or the record is incomplete, on any material issue of fact, summary judgment is inappropriate. *Prescott v. Leaf River Forest Prod. Inc.,* 740 So. 2d 301 at ¶ 15 (Miss. 1999).

"[I]t is well-settled that motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion." *Dailey* at ¶ 3. "It is well-settled law in Mississippi that "the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness." *Graham v. State,* 812 So. 2d 1150, 1153 (Miss. App. 2002) quoting *Meshell v. State,* 506 So. 2d 989, 992 (Miss. 1987).

The Law Regarding Liability of Agents

In *Bobby Kitchens, Inc. v. Mississippi Insurance Guaranty Assoc.,* 560 So. 2d 129 (Miss.1989), the Mississippi Supreme Court stated:
Leathers v. Aetna Cas. & Sur. Co., 500 So. 2d 451 (Miss. 1986) ... holds that ... "[the] general rule in tort is that the agent or servant, the one whose conduct has rendered his principal liable, has individual liability to the plaintiff. In many contexts the principal thereafter has indemnity rights against the agent." Leathers, 500 So. 2d at 453.

Deborah Spence is one of those agents of Beverly Healthcare whose conduct will render her principal liable for failing to meet the appropriate standard of care for nursing homes by failing to assess the care needs of residents, including Gloria Ashby, and to make appropriate decisions and arrangements concerning the number and level of training of nursing personnel needed

to provide proper care for all residents including Gloria Ashby, failing to adequate training of staff to provide appropriate care, failing to adequately supervise the line staff rendering daily care, failing to conduct proper review and evaluation of staff performance, failing to create and enforce policies for screening and hiring of staff, policies to assure adequate care and treatment of patients meeting their medical, nursing and social needs, failing to assure that a proper treatment care plan is developed and consistently implemented for Gloria Ashby, and failing to implement corrective measures in these areas. Under *Bobby Kitchens* and *Leathers*, she has individual liability to the Plaintiffs in this case for that conduct in addition to the liability of Beverly Healthcare. Under *Turner v. Wilson*, 620 So. 2d 545, 548-49 (Miss. 1983), she is also responsible for the acts of her subordinates that she either knew of or should have known of and acquiesced in even if she did not affirmatively authorize their actions or inactions.

Miss. Code Ann. § 43-47-19 (1986) makes its unlawful for any person to neglect a vulnerable adult unable to care for himself. This statute also makes it unlawful for any person "to commi[t] an act or omi[t] the performance of *any duty*, which act or omission contributes to, tends to contribute to or results in the abuse, neglect or **exploitation** of any vulnerable adult...." There is no limitation in the Vulnerable Adults Act as to the source of the duty and no requirement of direct participation. All that is necessary is that the violation of *any* duty *contribute to* abuse, neglect or **exploitation** of a vulnerable adult. There is nothing which says that the source of the duty referred to by the Vulnerable Adults Act cannot be a regulation. [1] To the contrary, any fair reading of the Vulnerable Adults Act would have to find that the Act is adopting by incorporation duties imposed by other sources such as state and federal regulations.

The Vulnerable Adults Act goes even further and makes it clear that it is not only incorporating such duties and making their breach unlawful, but it is also clearly stating that its purpose is to protect vulnerable adults such as nursing home residents by making unlawful the breach of any duty as long as it *contributes to* the neglect or abuse of a vulnerable adult. The legislature also specifically stated that the purpose of the act is to protect vulnerable adults who are defined to include all residents of nursing homes. Miss. Code §§ 43-47-3 and 43-47-5

Miss. Code § 43-47-37 also requires any person, who within the scope of his employment at a health care facility, has knowledge of or reason to believe any patient has been the victim of abuse or **exploitation** to report the incident or cause a report to be made. The Vulnerable Adults Act and the regulations applicable to nursing home administrators, particularly the state regulations, support personal liability based on negligence per se. The Vulnerable Adults Act and Nursing Home Minimum Standards § 408.2(e) [2] take this case out of the realm of the holding of *Moore v. Memorial Hospital of Gulfport*, 825 So. 2d 658 (Miss. 2002) that the pharmacy regulations do not support negligence per se. *Gray v. Beverly Enterprises et. al*, 390 F.3d 400, 407-8 (5th Cir. 2004) Even if they did not, violation of these regulations would be evidence of ordinary common law negligence. *Gray* at 407 quoting *Moore v. Mem'l Hosp.*, 825 So. 2d 658, 665 (Miss. 2002)

Deborah Spence's theory as to why no claim can be stated against her is that she did not directly participate in or authorize the commission of a tort against Gloria Ashby. This precise theory has been extensively litigated in the context of claims against nursing home administrators and licensees who have argued fraudulent joinder after removal to federal court in diversity cases. It has been rejected by a number of federal district courts, and most recently the Fifth Circuit, applying Mississippi law. See *Gray v. Beverly Enterprises et. al*, 390 F.3d 400 (5th Cir. 2004), *Hill v. Beverly Enterprises-Mississippi, Inc.*, 305 F. Supp. 2d 644 (S.D. Miss. 2003); *Bradley v. Grancare, Inc.*, et al., 2003 U.S. Dist. LEXIS 24938 (Aug. 15, 2003); *Box v. Beverly Health and Rehabilitation Servs., Inc.*, Civil Action No. 3:03CV22-SAA, 2003 U.S. Dist. LEXIS 24939 (N.D. Miss. May 30, 2003) *LaBauve v. The Service Master Co.*, Civil Action No. 3:00CV785WS (S.D. Miss. Jan. 14, 2002); *Estate of Willie Belle Barham v. Shady Lawn Nursing Home, Inc.*, Civil Action No. 5:01CV129BrS, 2001 U.S. Dist. LEXIS 25695 (S.D. Miss. Oct. 23, 2001)

These opinions recognize that an agent of a disclosed principal is liable for his own torts. They recognize that under Mississippi law, an agent of a disclosed principal is liable for any tort that s/he directly participates in. *Mississippi Printing Co., Inc. v. Maris, West & Baker, Inc.*, 492 So.2d 977, 978 (Miss.1986); *Hart v. Bayer Corporation*, 199 F.3d 239, 247 (5th Cir. 2000). These cases reject a narrow view of what constitutes direct participation. They recognize that neither "hand-on care" nor participation

in the day to day care of a particular resident is required to show that a defendant with managerial or supervisory responsibilities directly participated in the commission of a tort against a nursing home resident. "[D]irectors, officers, and agents may be liable for torts where they either participated in the act, authorized it or directed it, gave consent to an act, or even acquiesced in a tortious act that they knew of or 'should have known of' in the exercise of reasonable care." *Gray* at 409-410 citing *Turner v. Wilson*, 620 So. 2d 545,548-49 (Miss. 1983)

The *Gray* court held that the allegation that negligence claims cannot be brought successfully against agents of disclosed principals under Mississippi law is likely erroneous. *Gray* at 12. *Gray* went on to say:
In addition to asserting that the in-state defendants were guilty of simple negligence, the complaints allege several breaches of supposed duties under the rubric of "inadequate management" constituting gross negligence.... The [district] court went on to conclude that as a general matter, any duty that the licensees and administrators had to manage the nursing home adequately was owed not to the plaintiffs, but to the business itself.... Plaintiffs further argue, citing Minimum Standards § 408.2(e), that the regulations provide an "explicit right of action" that establishes a duty. Indeed, the applicable regulation does appear to grant such a right.... Thus, defendants are not able to meet their heavy burden of showing that there is no reasonable possibility that plaintiffs can recover in state court.

...the plaintiffs additionally allege direct participation on behalf of the licensees and administrators in the supposed grossly negligent care of residents. The district court found that the plaintiffs cannot adequately show that the in-state defendants were sufficiently directly involved in the "hands-on care of the plaintiff' to saddle independent tort liability on an agent of a disclosed principal. Both sides concede that such an agent may be liable under Mississippi law where he was directly involved in the commission of a tort--in this case, if the in-state defendants were directly involved in resident care.

The issue, therefore, is what constitutes "direct." The defendants and the district court apparently equated the term with hands-on care....plaintiffs rely on cases purporting to establish liability for a wider spectrum of acts and omissions. For example, in *Turner v. Wilson*, 620 So. 2d 545, 548-49 (Miss. 1983), the court stated that directors, officers, and agents maybe liable for torts where they either *participated in the act, authorized it or directed it, gave consent to an act, or even acquiesced in a tortious act that they knew of or "should have known of" in the exercise of reasonable care....* Plaintiffs also point to numerous unreported district court decisions in Mississippi in which, under very similar circumstances (some involving the same defendants as in this case), the courts, in plaintiffs' words, "rejected the defendants' 'myopic view of direct participation' as requiring personal contact..." (quoting *Hill).* In those unreported cases, the district court held that a nursing home administrator, like the in-state defendants, may be held liable for their personal tortious conduct without personal, hands-on contact with the plaintiff. *See, e.g., Hill.* Rather, allegations of failure to perform managerial duties, such as maintaining adequate records and supervising those members of the staff who handled the residents' day-to-day care, were held sufficient to "afford a reasonable basis for imposing personal liability under Mississippi law." at *Bradley v. Grancare, Inc.*, No.4:03CV93-P-B, at *5-6 (N.D. Miss. Aug. 18, 2003).

Lastly, plaintiffs rely on *Rein v. Benchmark Constr. Co.*, 2003 Miss. LEXIS 282, 2003 WL 21356013 (Miss. June 12, 2003), for the proposition that the question whether these defendants owe a duty to plaintiffs is one of fact. In *Rein,* a nursing home resident sued a pest control company for injuries inflicted by ants. The court found that it was possible that the pest control company was an independent contractor with no independent duty to the plaintiff. Nevertheless, it held that the question was one for the trier of fact. *2003 Miss. LEXIS 282, [WL] at *12.* Thus, plaintiffs assume that there is at least a reasonable possibility that the non-diverse defendants in this case owe a duty to them.

On balance, plaintiffs have the better of the argument .... Plaintiffs cannot demonstrate hands-on contact by the defendants, but such activity does not seem required to impose personal liability under Mississippi law. *One may easily be a direct participant in tortious conduct by merely authorizing or negligently failing to remedy misconduct by one's subordinates.*

Gray at 405-410. (emphasis added)

The cases cited by Spence for the proposition that only the employer is liable for the kinds of allegations made against her are distinguishable and do not truly support her defense. The *holding of Jones v. Toy*, 476 So. 2d 30 (Miss. 1985) is

> Ordinarily, at common law, a master cannot be liable for the negligence of a fellow employee who was hired with due care. However, the master or employer may be charged with the employee's negligence and held liable for resulting injuries if the master knew or should have known of the fellow servant's incompetence.

476 So.2d at 31. The holding of *Meridian v. Hardy*, 244 Miss. 372, 141 So. 2d 566 (1962) is:

> The general rule is that in the case of employment requiring numbers of workers to act in concert, it is the duty of the employer to provide a sufficient force to enable his employee to accomplish the work assigned to them with reasonable safety to themselves, and, if an injury results to an employee by reason of insufficiency in the number of his co-workers, he is entitled to maintain an action against the employer.

141 So.2d at 568.

The holding of *Summers v. St. Andrew's Episcopal Sch.*, 759 So. 2d 1203 (Miss. 2000) was not that a middle manager could not be liable for his own acts of negligent supervision. The holding was that the negligent supervision claim failed because the school had no duty to provide constant supervision of all movements of pupils at all times and the particular incident was not foreseeable.

Griffin v. Dolgen Corp., 143 F. Supp. 2d 670 (S.D. Miss. 2001) was a premises liability case and the issue there was whether a store manager was the equivalent of an owner or person in charge of the premises for purposes of the premises liability standard of liability. It does not address the issue of the negligent management or negligent supervision or any type of negligence other than premises liability. Moreover, a key word in Spence's use of this case is “contribute.” Her statement of the law leaves room for managerial liability when the manager's action or inaction contributes to the injury. The negligence of the administrator in this case did contribute to the overall substandard environment of care that affected all patients.

These cases cited by Spence do not hold that only the employer can be liable on claims of inadequate staffing, training, supervision or negligence in other managerial areas. They do hold that the employer can be liable, but they do not hold that the agent of the employer whose negligence contributed to the problem cannot also be held liable. Moreover, none of these cases address *Bobby Kitchens, Turner v. Wilson* or any of the case law and theories relied upon in *Gray v. Beverly Enterprises.*

CONCLUSION

Numerous courts applying Mississippi law have rejected the bases relied upon in Deborah Spence's motion to dismiss or in the alternative for summary judgment when considering claims against nursing home administrators. It follows from the cases on administrators that there is a cause of action against an administrator on the theories and allegations stated in Plaintiff's complaint. Accordingly, Ms. Spence's motion does not meet the standard for dismissal for failure to state a claim under M.R.C.P. 12(b)(6). Since her motion for summary judgment is based on the same theories, she also fails to show that she is entitled to judgment as a matter of law. The Complaint provides sufficient evidence of the viability of the claims in the Administrator Count that Spence's motion should be denied.

Respectfully submitted, this 21 day of March, 2006.

<<signature>>

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Footnotes

1 There are numerous federal and state regulations setting forth duties of administrators which Plaintiff has reason to believe she will be able to establish in regard to Gloria Ashby's care given appropriate discovery.

2 This section provides an explicit cause or right of action for violation of the minimum standards.

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